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JAMES R. BROWNING,

IN THE

Supreme Court of the United States

OCTOBER TERM — 1959

No. 340

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
Appellants,

v.

UNION PRODUCING COMPANY, ET AL,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Benjamin Clayton, R. S. Nixon, Nueces Royalty Company, a partnership, Paul J. Rogers, J. Virgil Scott and Erwin W. Smith pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on May 21, 1959.

OPINIONS BELOW

The memorandum opinion of the District Court may be found at page 214 of the record, and the opinion of the Court of Appeals is included herein as Appendix A, infra.

A petition for rehearing was denied by the Court of Appeals without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1959. A petition for rehearing was denied on July 20, 1959. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in affirming a judgment by the District Court granting a summary judgment to respondents, and in holding that as a matter of local law of the State of Texas, term mineral interests owned by petitioners and expiring by the terms thereof on October 25, 1955 in the absence of production of minerals, terminated and reverted to respondents on that date notwithstanding compliance with a lease provision covering all mineral interests here involved defining production to include the payment of shut-in royalties on a shut-in gas well.

2. Where a case involving the precise issue on which the courts below based their decisions is now pending before the Supreme Court of Texas, and where that court has never passed upon the precise issue, should the judgment of the Court of Appeals be vacated and the cause remanded to await the state court's declaration of the local law on the controlling issue.

STATEMENT

This is an interpleader suit brought by the mineral lessee, Union Producing Company, a Delaware corporation, against those persons asserting mineral and royalty interests in a tract of land located in the Rio Grande Valley in Texas. The only controversy is between the petitioners and the respondents, all of whom are citizens of the State of Texas, the question being whether the interests of the

term mineral owners (petitioners) have terminated and reverted to respondents.

Petitioners claim under deeds (R. 26, 29) executed in 1935 conveying fractional interests in the minerals for a stated term of years and so long thereafter as oil, gas or other minerals are produced from the property. Such deeds further provide that it will not be necessary for the grantees to join in the execution of any lease, and as found by the District Court, (R. 222) all parties construed the deeds as reserving to the grantors, under whom respondents claim, the exclusive right to lease all of the minerals. In 1949, respondents executed an oil and gas lease (Supp. R. 1) purporting to lease all of the minerals, including petitioners' interests therein, which lease included what is commonly termed a shut-in gas well clause (Supp. R. 10). This clause provides that where gas is discovered but not marketed, the lessee may pay a stated sum, and upon such payment, it will be considered that gas is being produced from the premises. A well *was* drilled; gas *was* discovered; the gas *was not* marketed pending the laying of gathering lines prior to the date specified for the termination of petitioners' interests (R. 18) and shut-in gas royalties *were* paid to petitioners and tendered to respondents within the period provided for in the lease (R. 125, 129, 183). Gas and condensate have been produced and marketed continuously since early April, 1956 (R. 19).

Under these facts the District Court granted a summary judgment to respondents relying upon the *dictum* in a case decided by an intermediate appellate court of this state which is readily distinguishable,[1] and holding that the peti-

[1] *Sellers* v. *Breidenbach*, 300 S.W. 2d 178 (Tex. Civ. App. 1957). While the case did involve a shut-in gas well, the lease did not have a shut-in royalty clause, and there consequently was no provision in the lease defining production to include such payments (R. 135).

tioners' interests had terminated on the ground that the lease provision defining production to include the payment of shut-in royalties did not inure to petitioners' benefit. The Court of Appeals affirmed summarily without even discussing two closely analogous cases decided by the Supreme Court of Texas[2] which held that lease provisions defining production to include production from pooled units constitute a modification of the term interests, and that consequently, such lease definitions do inure to the benefit of the term interest owners.

REASONS FOR GRANTING THE WRIT

1. The oil and gas industry is, of course, a most important segment of the economy of this state. Conveyances of fractional interests in minerals for stated terms and so long thereafter as minerals are produced are becoming increasingly prevalent, and are, in turn, a significant part of our oil and gas industry. Petitioners respectfully submit that the decision of the Court of Appeals is in conflict with the local law as declared by the highest court of the state in the *Spradley* and *Southland* decisions, supra, in closely analogous cases. While distinguishable from the instant case since the set of circumstances defined by the leases as production differ from those herein involved, the rationale of those decisions — that the lease definitions inure to the benefit of term interest owners — is clear. Purely as a matter of forecasting the decision of the Supreme Court of Texas on the precise issue here involved, petitioners submit that the Court of Appeals erred. However, no forecast by the federal courts on this important issue of local law is necessary since the *precise issue* on which both the Dis-

[2] *Spradley* v. *Finley*, 302 S.W. 2d 409 (Tex. Sup. 1957); *Southland Royalty Co.* v. *Humble Oil & Refining Co.*, 249 S.W. 2d 914 (Tex. Sup. 1952).

trict Court and the Court of Appeals based their decisions is now pending in the Supreme Court of Texas. In the case of *Archer County, et al,* v. *Webb, et al,* the State District Court of Crockett County, Texas, entered summary judgment in favor of term royalty owners whose interests were to expire in the absence of production, holding that such interests were extended by virtue of a lease provision defining production to include the payment of royalties on a shut-in gas well. The Court of Appeals for the Eighth Judicial District sitting at El Paso, Texas, reversed on the basis of the opinion of the Court of Appeals in the instant case, and a motion for rehearing was denied on July 15, 1959. The opinion of the Court of Civil Appeals is reported in ..... S.W. 2d ..... Due to basic factual similarities, the decision by the Supreme Court of Texas should doubtlessly be controlling of this case. As shown by the certificate of the Clerk of the Supreme Court of Texas (Appendix B, infra., page ....) a writ of error has been applied for, and action by that court on the application is expected momentarily.

Unless this petition for a writ of certiorari is granted, petitioners' interests will be irretrievably lost even though the Supreme Court of Texas, whose decisions control in cases of this kind, *Erie Railroad* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1937), declares the rule in Texas, as it is in Louisiana,[3] to be that term interests are extended by the payment of shut-in royalties pursuant to the lease provision. It is evident that in that event, a serious injustice will have been done to petitioners, and their interests will have terminated solely because of the fortuitous

[3] *LeBlanc* v. *Haynesville Mercantile Co., Inc.,* 88 So. 2d 377, (La. Sup. 195....).

combination of the incorporation of Union Producing Company in Delaware, the Texas citizenship of the claimants to the mineral interests, and the election of Union Producing Company, which actually has no interest in the outcome of the litigation, to file this suit in the federal court rather than in the state court. Petitioners respectfully submit that no such contrariety should be encouraged by a premature decision of the federal courts when an opportunity to insure unanimity is presented by a case pending in the highest court of the state.

Since the Court's decision in *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1941), it is settled that in cases governed by local law, decisions of the highest court of the state announced subsequent to the judgment of the District Court but prior to the entry of a final judgment in the federal courts, must be followed. This Court has vacated judgments of courts of appeal and remanded cases to those courts for reconsideration in the light of subsequent state decisions. *Huddleston* v. *Dwyer*, 322 U.S. 232, 88 L. Ed 1246 ..... S. Ct. ..... (1943). Numerous other decisions have announced the desirability of staying actions in the federal courts pending decisions by the state courts where local law is decisive. *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 86 L. Ed. 1355, 62 S. Ct. 786 (1941); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1940); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 265 (1942); *Manufacturers Casualty Insurance Company* v. *Coker*, 219 F. 2d 631 (4th Cir. 1955); *Cowling* v. *Deep Vein Coal Co.*, 183 F. 2d 652 (7th Cir. 1950). This is particularly true where a suit is already pending in the state court. *Arkansas* v. *Texas*, 346 U.S. 368, 98 L. Ed. 80, 74 S. Ct. 109 (1953).

As was observed by the Court in the recent case of *Louisiana Power & Light Company* v. *Thibodeaux*, 3 L. Ed. 1058 (1959):

> "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state laws . . . "

The Court has also stated in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 84 L. Ed. 876, 60 S. Ct. 628 (1939):

> " . . . Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois, it may appear that rights in local property of parties to this proceeding have — by the accident of federal jurisdiction — been determined contrary to the law of the state which in such matters is supreme."

The application of the Court's statement in the *Thompson* case to the instant case is abundantly clear. If the writ is denied petitioners will have lost their interests although in the *Archer County* case, the Supreme Court of Texas may, and petitioners submit that said court will by virtue of its earlier analogous decisions, declare erroneous the forecast of the local law by the Court of Appeals in this case. The delicate federal-state relationship is hardly prompted by such a result which can be easily averted by the simple expedient of postponing a final judgment in this case.

CONCLUSION

Petitioners respectfully submit that the only commonsense approach to the problem dictates that (1) this case be reversed, (2) the judgment of the Court of Appeals be vacated, and (3) the Court of Appeals be instructed to defer

further consideration until the impending decision in the *Archer County* case by the Supreme Court of Texas has been made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the above and foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon all counsel for respondents and Mr. W. S. Stovall, by placing copies of same properly addressed and stamped in the United States mail on this the 22 day of August, 1959.

Austin C. Wilson

AUSTIN C. WILSON

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17495

J. VIRGIL SCOTT, ET AL and PAUL J. ROGERS, ET AL.,
Appellants,

v.

UNION PRODUCING COMPANY, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

(May 21, 1959.)

Before HUTCHESON, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: These are appeals from a summary judgment entered on motions filed in an interpleader action brought by Union Producing Co., lessee in an oil and gas lease, to have determined and declared the owners of mineral interests subject to the lease and the pro-

portions of royalties and payments thereunder to which, as such owners, they are entitled. It presents for decision here the single question whether the district judge erred in holding, on the authority of *Sellers* v. *Breidenbach*, 300 SW(2) 178,[1] that the fractional mineral interests acquired by appellants under term mineral deeds had terminated, and the interests had reverted to the grantors.

Because the undisputed and controlling facts are fully and correctly set out and the law is as fully and correctly declared in the thoughtful opinion[2] of the district judge, we shall not undertake to present and discuss the theories and arguments of appellants and appellees in opposition and in support, but, referring with agreement and approval to the district judge's analysis of the law and the facts and contenting ourselves with adopting his thorough going opinion as our own, we affirm the judgment upon the considerations and for the reasons stated by him.

We add only a reference to the recent opinion of the Supreme Court of Texas in *Midwest Oil* v. *Winsauer*, ... Tex. ..... (4-15-59), a case dealing with a temporary cessation of production without fault on the part of the operator after production had been begun within the term.

There, distinguishing the Sellers and Holchak cases, the Supreme Court expressly approved the principle upon which they were decided, that term clauses in mineral deeds are analogous to and must be given the same effect as similar term clauses in term mineral leases. Saying:

---

[1] Cf. Freeman v. Magnolia, 141 Texas 274, Morrison v. Swaim, 220 S.W(2) 493; Clark v. Holchak, 152 Tex. 26; and *Holchak* v. *Clark, 284 SW(2) 399.*

[2] Union Producing Co. v. Scott, ... F. Supp. ....., June, 1958.

> "We see no reason why the same general principles of law governing the construction of oil and gas leases containing habendum clauses providing the estate conveyed shall continue after the expiration of its primary term so long as oil or gas is produced, should not be applicable to the construction of a term royalty deed containing the same or similar provisions. The 'term royalty' in the case at bar is a determinable fee just as is the lessee's estate."

and citing applicable cases, the Supreme Court held that *in the event of temporary cessation of production without fault on the part of the operator,* plaintiffs' right to enjoy the royalty "will continue in any event as long as the operator in good faith exercises diligence."

Rejecting the claim that Holchak and Sellers had held differently, the court stated:

> "These cases are not in point. Neither of these cases dealt with the question of cessation of production either temporary or permanent. The question in the Holchak case, supra, was 'whether or not there was paying production from the land within six months after Dec. 10, 1945, i.e., on June 10, 1946'. The uncontradicted evidence was that on or before June 10, 1946, there was no production from the well situated on the premises covered by the royalty deed. The same question was involved in the Sellers case, supra. The court simply held there was no production whatever from the premises."

In the light of this opinion, of the cases cited in it, and of those cited by the district judge, we believe there is no escape from his conclusion that the reliance of the mineral deeds claimants upon the shut-in gas well provision in the oil and gas lease will not do, and that this is so for the reason stated by him:

> *"It is the mineral deed, not the lease,* that should have contained a provision securing to the term mineral owners the benefit of a shut-in gas well provision."

The judgment was right. It is AFFIRMED.

[SEAL]

A true copy

Test:

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
AUG 5 1959

JUDGMENT

Extract from the Minutes of May 21, 1959.

No. 17495

J. VIRGIL SCOTT, ET AL., and PAUL J. ROGERS, ET AL.,

v.

UNION PRODUCING COMPANY, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, J. Virgil Scott, and others and the surety on their Cost Bond herein, National Surety Corporation, and the appellants Paul J. Rogers, and others and the surety on their Cost Bond herein, Globe Indemnity Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * *

APPENDIX B

IN THE

Supreme Court of Texas

No. A-7490

ARCHER COUNTY, TEXAS, ET AL.,

v.

C. R. WEBB, ET AL.

FROM CROCKETT COUNTY, EIGHTH DISTRICT.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that application on behalf of Archer County, Texas, et al, and application on behalf of C. R. Webb, et al, for writs of error to the Court of Civil Appeals, Eighth Supreme Judicial District, were received and filed as numbered and styled above, on this 17th day of August, 1959.

IN TESTIMONY WHEREOF witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 17th day of August, 1959.

GEO. H. TEMPLIN, Clerk

By /s/ JEWELL SEELIGER
Mrs. Jewell Seeliger, Deputy

[SEAL]